IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10579 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

KRISHNAKANT MAGANLAL BRAHMBHATT - Petitioner(s)

Versus

STATE OF GUJARAT & 5 - Respondent(s)

==========

Appearance :

MR BS BRAHMBHATT for Petitioner(s) : 1,
MR DIPEN DESAI, Ld. AGP for Respondent(s) : 1,5 - 6.
RULE SERVED for Respondent(s) : 2 - 4.

==========

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 30/11/2005

ORAL JUDGMENT

1. The short facts of the case are that the order dated 3.1.1996 came to be passed for posting of the petitioner as Sr. Clerk (Accounts) on the basis of the

seniority and it was expressly provided in the said order that if the petitioner does not resume the duty at the transferred place, the petitioner would not be entitled to the benefits of resolution dated 16.8.1994. It is an admitted position that the petitioner did not resume duty in pursuance of the transfer order, nor the petitioner challenged the said transfer order and the fact remains that the transfer order operated. As per the petitioner, the competent authority had not issued the transfer order and, therefore, he did not obey the transfer order. It appears that thereafter the petitioner applied for conferring the benefits of higher pay-scale in pursuance of the Government Resolution dated 16.8.1994 and the said request of the petitioner is rejected as per the decision dated 10.3.1997 of the competent authority on the ground that the petitioner did not obey by the conditions of posting as Sr. Clerk (Accounts) and, therefore, he would not be entitled to the benefits of the said benefits of the said Government Resolution. It appears that the petitioner challenged the said order by preferring appeal No.213 of 1997 before the Gujarat Civil Service Tribunal and the Tribunal dismissed the appeal as per the decision dated 24th October, 2001 and

thereafter the petitioner has approached this Court by preferring the present petition.

2. Heard Mr.Brahmbhatt, learned Counsel for the petitioner and Mr.Desai, learned AGP for the State Authorities.

3. As such the reasons recorded by the Tribunal from paragraph 7 onwards shows that the Tribunal rejected the appeal of the petitioner on the ground that the opportunity was given to the petitioner to get the benefits of the higher pay-scale in pursuance of the Resolution dated 16.8.1994 at the time when the order dated 3.1.1996 came to be passed. However, the petitioner himself did not resume the duty at the transferred place and consequently would not be entitled to the benefits of the Government Resolution dated 16.8.1994. The reasons recorded by the Tribunal further shows that the Tribunal found that if the person is not resuming the duty at the transferred place, which was found by the Tribunal as that of a promotional avenue, and thereafter sticks to the post and claims only higher pay-scale conferring of such benefits, the same would be a mockery and, therefore, the Tribunal has not accepted the appeal of the petitioner.

4. Mr.Brahmbhatt, learned Counsel for the petitioner,

submitted that the order by which the petitioner was posted as Sr. Clerk (Accounts) cannot be said as promotion avenue, but can be said as a transfer order. He submitted that, therefore, the Tribunal has not properly considered the said aspect.

5. In my view, even if the order is treated as that of transfer order, then also the fact remains that there was express stipulation in the order that if the petitioner fails to join at the transferred place as Sr. Clerk (Accounts) or if he abandons the post at that place, he would not be entitled for the benefits of the Government Resolution dated 16.8.1994 and, therefore, when the aforesaid conditions were expressly provided and in spite of the same, the petitioner did not join at the transferred place and if the authority has declined the benefits of Government Resolution dated 16 8.1994 for giving higher pay-scale, such an action on the part of the authority cannot be said to be unreasonable or arbitrary. The Tribunal has also recorded that it is on the basis of the seniority the regular posting was being made. Further, in any case, the order dated 3.1.1996 is accepted by the petitioner and not challenged before any authority and thereafter when the benefit is not conferred upon the petitioner

in pursuance of the order dated 3.1.1996 read with the Government Resolution dated 16.8.1994, the petitioner cannot contend that such condition could not have been incorporated.

6. It may be recorded that the benefits as per the resolution dated 16.8.1994 of the Government are with a view to enable the employee to get higher pay-scale and to avoid stagnancy, more particularly when the posts are not available. Such benefits cannot be conferred upon he employee who is not desirous to abide by the discipline in the employment. The petitioner when did not join the duty in pursuance of the order dated 3.1.1996, voluntarily run the risk of the consequence of the order and such consequence has fallen when the petitioner applied for giving of the higher pay-scale and, therefore, the final view taken by the Tribunal, in view of the aforesaid observations of this Court, does not deserve to be upset even if the order dated 3.1.1996 is treated as that of a transfer order.

7. Mr.Barhmbhatt, learned Counsel appearing for the petitioner, by relying upon the documents produced at Annexure I, submitted that there was internal communication by Superintending Engineer dated 24.6.1998 that the Department had agreed to sanction

the higher-pay scale and, therefore, he submitted that the Tribunal could not have ignored the said aspect or, in any case, the benefits could have been conferred upon the petitioner.

8. The order of the Tribunal does not refer to such communication, nor any material is placed on record of this Court that such communication was placed before the Tribunal or was brought to the notice of the Tribunal at the time when the application came to be heard and/or decided and, therefore, on such ground, no fault can be found with the order passed by the Tribunal that there is no proper exercise of the power.

9. The scope of judicial scrutiny in a petition under Article 227 of the Constitution is limited. This Court is not exercising the power as that of a Court of appeal against the decision of the Tribunal. Unless the decision is perverse to the record or the discretion exercised is ex facie illegal, this Court may not upset the view taken by the lower authority.

10. In view of the above, I find that the order passed by the Tribunal dismissing the appeal does not deserve to be interfered with since it cannot be said that the Tribunal has ex facie committed illegality or that the discretion exercised is so perverse that this Court may

interfere in exercise of its jurisdiction under Article 227 of the constitution of India. It appears to this Court that the Tribunal has rightly exercised the discretion and no error apparent on the face of record is committed by the Tribunal.

11.Mr.Brahmbhatt, learned Counsel for the petitioner lastly submitted that the name of the petitioner is not mentioned in the seniority list prepared by the Department and in his submission, the name of the petitioner should have been included in the list.

12.It appears that no decision is communicated to the petitioner by the authority even as per the petitioner in this regard. Therefore, the petitioner may make representation for inclusion of his name in the list. If such a representation is made, the same may be examined by the authority in accordance with law and the decision shall be communicated preferably within a period of three months from the date of receipt of the said representation and the copy of the order of this Court.

13.In view of the above, subject to aforesaid observations and directions, the petition fails. Hence, the same is dismissed. Subject to the aforesaid observations and directions, Rule discharged.

Considering the facts and circumstances, there shall be no order as to costs.

30.11.2005 **(Jayant Patel, J.)**

vinod